Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

JOHN MCCOMISH, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF RESPONDENTS

JUDITH A. SCOTT
MARK D. SCHNEIDER*
ARI WEISBARD
Service Employees International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 350-6571
Mark.Schneider@seiu.org
Counsel for Service Employees International Union
**Counsel of Record*

February 22, 2011

Peake Deluxe Printers, LLC · (301) 341-4800 · Cheverly, MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
1. A.R.S. § 16-952 Should Be Subject to Intermediate, Not Strict, Judicial Scrutiny	4
2. Arizona Law Does Not Compel Petitioners to Subsidize Hostile Speech	6
3. Strict Scrutiny Does Not Apply Because Arizona's Public Financing System Does Not Restrict Speech	9
4. The Arizona Law Furthers Legitimate Governmental Interests	11
5. The Challenged Trigger Provision Bears a Substantial Relation to the Law's Anti-Corruption Interests	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	Page
Buckley v. Valeo, 424 U.S. 1 (1976)	*passim*
Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 231 (2000)	5
Citizens United v. FEC, 130 S. Ct. 876 (2010)	6, 14
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	12
Davis v. Federal Election Comm'n, 554 U.S. 724 (2008)	*passim*
FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985)	11
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	13
Grosjean v. American Press Co., 297 U.S. 233 (1936)	13
Maher v. Roe, 432 U.S. 464 (1977)	5
McConnell v. FEC, 540 U.S. 93 (2003)	11
Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998)	5, 8
Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986)	6, 8
Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)	5, 8
Rust v. Sullivan, 500 U.S. 173 (1991)	5, 8
Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994)	6
United States v. O'Brien, 391 U.S. 367 (1968)	12

INTEREST OF THE AMICUS CURIAE[1]

Amicus Service Employees International Union ("SEIU") is one of the largest unions in North America. It represents 2.2 million workers in service industries throughout the United States and Canada. SEIU's members' voluntary contributions make SEIU's political action committee, the SEIU Committee on Political Education, one of the nation's largest PACs. Directly and through its affiliated local unions, SEIU actively participates in elections at all levels of federal, state, and local government, including in the state of Arizona. Because SEIU's members want to participate in fair and transparent electoral processes, SEIU has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

The Court should affirm the decision of the Ninth Circuit. This case involves a challenge to an Arizona law that subsidizes campaign speech for the purpose of reducing the risk of corruption in its electoral process. Petitioners claim that Arizona's manner of calculating this subsidy burdens the speech of those who choose not to accept the subsidy. There is a well-developed First Amendment jurisprudence that makes clear that such subsidies raise different and less substantial First Amendment concerns than government restrictions of speech and should be subject to intermediate judicial scrutiny. Petitioners' failure to acknowledge this difference infects virtually every aspect of their argument.

Specifically, Petitioners make two First Amendment claims that constitute direct assaults on this Court's hold-

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

ing in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding the federal public financing regime for Presidential elections. In their first Question Presented, they argue that Arizona's public financing law violates a non-participating candidate's free speech rights because it assertedly penalizes candidates who choose to speak with their own funds and effectively forces them to subsidize the speech of their opponents. A substantially similar claim was considered and rejected by the Court in *Buckley*, which held that laws that subsidize speech advance — rather than deter — First Amendment values, and do not force non-participants to subsidize participants.

Petitioners' second Question Presented similarly makes a claim that is inconsistent with the holding of *Buckley*. Petitioners argue that because Arizona's public financing regime is relatively more helpful to candidates with relatively less access to the large sums of money it sometimes takes to run a successful political campaign, it runs afoul of the Court's holdings that "equalization" is not a legitimate goal of campaign finance law.

But this claim could be made against any public financing scheme, because it can always be argued that public financing benefits candidates with relatively less access to money and so in that way "equalizes" political campaigns. Notwithstanding this same equalizing effect, the Court in *Buckley* approved Congress' Presidential public financing scheme, while at the same time making clear in contrast that laws whose sole purpose is to "equalize" all candidate's opportunities by restricting speech are unlawful. Nothing about the particular way Arizona's public financing law operates distinguishes it in relevant respects from the public financing law upheld in *Buckley*.

This Court's decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), does not support either of Petitioners' claims. There the Court struck down a law

which directly and asymmetrically *restricted* self-financing candidates' speech more than others, for the *sole* purpose of leveling the playing field as between rich and poor candidates. Arizona's law shares neither of those characteristics.

Regulations aimed at reducing the risk of corruption of the political process, and the appearance of such risk, advance compelling government interests, and the most comprehensive solution to the problem of quid pro quo corruption is a system of public financing that makes it possible to compete for political office without having to raise contributions at all, acting "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91.

Arizona's law directly advances these compelling interests and fits comfortably among the laws this Court has upheld against First Amendment challenge. The Court should decline Petitioners' invitation to overrule these precedents and radically reconfigure both campaign finance and First Amendment jurisprudence.

ARGUMENT

SEIU often contributes to candidates up to the maximum amount allowed by law, and it operates a substantial independent expenditure program of behalf of candidates it supports. On Petitioners' way of thinking, SEIU therefore is an entity that is "burdened" and "punished" as a result of Arizona's public financing scheme. We do not share this view. Arizona's law allows us – and everyone else – to spend freely to provide independent support to candidates we endorse. We make such expenditures notwithstanding the Arizona "trigger" mechanism for many reasons, including a belief that our spending will be

effective in reaching particular voters, and that our speech will be more persuasive than any additional speech triggered by our activity.

In any event, our experience is that whatever burden we suffer as a result of this and other public financing regimes is greatly outweighed by the fact that public financing enhances our members' and the public's sense that elections are honest and fairly conducted. We would much rather participate in an election that is fair and free of any taint of corruption than in a purely privately-financed election, even though our resources might allow us to play a more prominent role in the absence of public financing.

But Petitioners' and amici's policy preferences regarding public financing are of little legal significance. Whether public financing "appear[s] 'bad,' 'unwise,' or 'unworkable' is [to the Court] irrelevant." *Buckley*, 424 U.S. at 91. The legally significant point is that the voters of Arizona, acting though referendum, choose to subsidize candidates' speech and encourage participation in Arizona's public financing program because they thought it would help address the problem of corruption in their electoral process. As we show in what follows, the First Amendment does not prevent them from implementing this policy judgment.

1. A.R.S. § 16-952 Should Be Subject to Intermediate, Not Strict, Judicial Scrutiny

Both of Petitioners' claims are predicated on their view that Arizona's law restricts their speech and should be scrutinized accordingly. But Arizona's law neither compels Petitioners to speak nor restricts their right to speak. Instead, Arizona provides content neutral subsidies for speech by candidates who voluntarily agree to abide by expenditure limits. These subsidies directly promote First Amendment values and only indirectly implicate Petitioners'

First Amendment interests. As the Court held in *Buckley*, because public funding laws are a state effort "not to abridge, restrict or censor speech but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," a public financing law "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93.

While the First Amendment "certainly has application in the subsidy context," governments "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998). "So long as legislation does not infringe on other constitutionally protected rights, [the legislature] has wide latitude to set spending priorities." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). Congress or a state government may "selectively fund a program to encourage certain activities it believes to be in the public interest" and doing so does not constitute discrimination "on the basis of viewpoint." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In addition, a government entity may provide funds to "facilitate a wide range of speech" by private individuals or organizations, *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 231, 233 (2000), provided that the government complies with the "requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. In sum, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

For these reasons, this Court has repeatedly rejected the argument that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech" as "not the law." *Regan*, 461 U.S. at 548. As long as "govern-

mental provision of subsidies is not aimed at the suppression of dangerous ideas," *id.* at 550 (internal citations omitted), the government has broad powers to encourage actions deemed to be in the public interest.

Thus, strict scrutiny applies only to "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," and laws that "compel speakers to utter or distribute speech bearing a particular message." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 643 (1994) (citations omitted). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* Because Petitioners challenge a speech subsidy, this Court should subject the challenged provision to intermediate, rather than strict scrutiny and determine only whether the challenged provision bears a "substantial relation" to a "sufficiently important" governmental interest. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

2. Arizona Law Does Not Compel Petitioners to Subsidize Hostile Speech

Petitioners' contrary claim is that the law should be subject to strict scrutiny and struck down because it "penalizes and deters free speech by forcing privately-funded candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money ... above a spending limit." First Question Presented. They assert that Arizona's program forces non participating candidates to "subsidize hostile speech," Pets. Br. 41, and its establishment is "the functional equivalent of the compelled speech regime struck down in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986)." Pets. Br. 42.

In *Buckley v. Valeo*, this Court rejected a substantially similar challenge to the federal law providing public financing of Presidential elections, which was claimed to violate the First Amendment because it effectively required people "to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n.124. The Court observed that

> [l]egislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and anti-trust exemptions for newspapers. *Id.* at n.127.

On that reasoning, the Court rejected any presumption that the law was unconstitutional and dismissed First Amendment challenge to the public financing law. That holding controls here.

The distinguishing "facts" that support Petitioners' "compelled speech" claim are a creation of their own rhetoric, and bear no relation to the actual operation of Arizona's law. Petitioners claim that Arizona "conscript[s] [the] labor" of candidates who choose not to participate in public funding, Pets. Br. 55, and that politicians in Arizona are "being required to assist in the rebuttal of their own speech." *Id.* at. 51. Less colorfully, they claim that they are being required to pay for their political opponents' speech. *Id.* at 55.

These factual assertions are false. Petitioners are not having their labor conscripted or their funds used by their opponents. Instead, Arizona is subsidizing the speech of candidates who opt in to its public funding campaign finance regime. Petitioners disapprove of the manner of adjusting the public subsidies that participating candidates

receive. But petitioners and other candidates and independent groups do not pay for that increase in their opponents' spending any more than they pay for the initial public spending subsidy. Just like the Presidential public financing at issue in *Buckley*, "the scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n. 124.

Buckley v. Valeo is one of an unbroken line of cases in which the Court has drawn a distinction between laws that require a person to pay for or associate with speech with which he disagrees, *see e.g. Pacific Gas & Elec. Co.*, 475 U.S. 1, and laws in which the government has chosen to subsidize one speaker and another unsubsidized speaker asserts that choice has burdened his speech rights, *see, e.g., Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173.

Pacific Gas & Elec. Co., on which Petitioners' compelled speech argument principally relies, Pets. Br. 42, itself explicitly distinguishes on two separate grounds PG&E's compelled speech claim from the challenges to the public campaign financing system sustained in *Buckley*. *Id.* at 15. First, the requirement that PG&E disseminate the views of its opponents identified "a favored speaker" and "force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *Id.* The Court held that "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in *Buckley* and in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)," and therefore "burdens the expression of the disfavored speaker." *Id.* at 14-15.

Second, the Court held that PG&E impermissibly was required "to associate with speech with which [it] may

disagree," *id.* at 15, because the speech would have been disseminated in envelopes that PG&E owned and that bore its return address, *id.* at 18. The danger that PG&E would "be required to alter its own message as a consequence of the government's coercive action . . . [arose] from a content-based grant of access to *private* property." *Id.* at 16-17 (emphasis added).

In this case, by contrast, the public financing system is content-neutral and does not require any speaker to finance the speech of his or her opponents: both the initial public campaign funding and any subsequent adjustments are provided by "the taxpaying public." In addition, Arizona's law presents no risk that candidates or groups that make independent expenditures will be forced to associate with speech with which they disagree. Rather, all disbursements of these public funds will be paid to the campaign accounts of the candidates who will use them, and any speech enabled by these funds will bear those candidates' names pursuant to disclosure requirements. No one could possibly think that a publicly-funded candidate's advertisements were being endorsed by his privately-funded opponent.

We are aware of no case in which this Court has applied the compelled speech strict scrutiny standard in circumstances involving the speech effects of government subsidies that neither restrict nor compel private parties' speech. The fact that a non-participating candidate's spending might affect the amount of subsidy provided to a participating candidate raises none of the constitutional infirmities present in compelled speech cases like *PG&E*.

3. Strict Scrutiny Does Not Apply Because Arizona's Public Financing System Does Not Restrict Speech

Just as this is not a "compelled speech" case, neither is it a case challenging a law that directly restricts speech.

No candidate is compelled to participate in Arizona's campaign public financing regime. A candidate who chooses not to participate is free to spend unlimited funds on his campaign, and his independent supporters likewise are not limited in what they may spend on his behalf. The only rules that restrict nonparticipating candidates' activities are the background (and unchallenged) contribution limits and disclosure rules that were in place before Arizona implemented public financing and apply equally to participating candidates.

This case is thus unlike *Davis*. The federal "Millionaires Amendment" struck down in *Davis* penalized candidates who exercised their constitutional right to fund their campaigns with their own money by imposing on such candidates direct and asymmetrical restrictions on their speech rights – self-funded candidates operated under lower contribution limits than candidates who were not able to contribute substantial amounts to their own campaigns. *Davis*, 554 U.S. at 751.

The Court in that case did not strike down that law merely because it imposed "negative consequences on individuals and groups for choosing to exercise their First Amendment rights." Pets. Br. 42. It struck down the law because the "negative consequences" were a direct violation of self-financing candidate's constitutional rights.

Contribution limits are restrictions on speech. Government subsidies are not. While the "millionaire" candidate in *Davis* has a First Amendment right not to have his speech discriminatorily restricted when he exercises his First Amendment right to spend his money, the candidate who chooses to decline public funding has no analogous First Amendment right to stop someone else from receiving a public subsidy that is tailored so that the public funding remains a viable option even in a relatively more expensive political campaign. *Davis* does not control this case.

4. The Arizona Law Furthers Legitimate Governmental Interests

Petitioners' second claim is that Arizona's law is unconstitutional because it furthers an illegitimate purpose – assertedly "to equalize 'influence' and financial resources among competing candidates and interest groups." Second Question Presented. Once again Petitioners' argument is painted with too broad a brush.

Any public financing law could be said to have the effect of benefitting the less well financed candidate relative to the better financed candidate. If that were enough to invalidate a campaign finance law, no public financing law would survive – including the Presidential public funding law affirmed by the Court in *Buckley*. But that is not enough.

It is undisputed that Arizona's law, like all public financing laws, is intended to reduce the risk of corruption of the political process, and the appearance of such risk. It is equally undisputed that these are legitimate — indeed compelling — government interests. *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *Buckley*, 424 U.S. at 25-30, 38.

Petitioners claim that the law is nevertheless invalid because it *also* has an allegedly illegal "equalizing" effect. In support of their view that speech subsidies that could be said to favor the poor over the rich for that reason violate the First Amendment, Petitioners rely on *Davis*. But that reliance is once again misplaced, for two reasons.

First, as discussed above, *supra* p. 10, *Davis* is a case about a law that restricted speech, with all that implies. This is not.

Second, in *Davis* the asymmetrical contribution limits

restricted self-financing candidates' speech *without* serving anticorruption interests. *Davis* took as its starting point the holding in *Buckley* that contribution restrictions were constitutional because they were justified by the compelling state interest in eliminating corruption or its appearance. Distinguishing *Buckley*, the Court in *Davis* then explained that the Millionaire's Amendment could not be justified by that same compelling state interest, since "discouraging use of personal funds disserves the anticorruption interest," and so the state could not rationally further that interest by providing non-self-funded candidates a higher contribution limit than self-funded candidates. 554 U.S. at 741. Instead, in *Davis*, the *sole* asserted government interest was to "level electoral opportunities for candidates of different personal wealth." *Id.* It was one of the principal holdings of *Davis* that this was not a legitimate governmental interest. *Id.*

But Arizona's law, in contrast, addresses corruption and the appearance of corruption. The assertion that, like any public financing law, it *also* could be said to have effect of improving the electoral opportunities of those with more limited access to private funds does not invalidate the law, or distinguish it from the law upheld in *Buckley*.

Petitioners and their *amici* make much of the assertion that the ballot initiative's drafters *intended* that the law have a "leveling" effect in addition to its anti-corruption purpose. But "leveling" by enhancing speech to make campaigns competitive is not unlawful, and even if it were "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *See also, e.g., City of Erie v. Pap's A.M.*, 529 U.S.

277, 291 (2000) (rejecting the argument that a ban on public nudity was "'aimed' at suppressing expression" because "one purpose of the ordinance [was] to combat harmful secondary effects").

The question is not the alleged mixed motive of the legislature, but rather whether "the inevitable effect of a statute on its face . . . abridged constitutional rights." *O'Brien*, 391 U.S. at 384, 385 (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). A.R.S. § 16-952 does not on its face have the "inevitable effect" of restricting speech. Indeed, as explained in Respondent's brief, p. 16, it has not appeared to deter political expenditures in Arizona even incidentally, and it has not deterred *amicus* SEIU's speech. To the contrary, the fact that roughly two thirds of candidates choose to participate in the system and one third do not suggests that this level of funding and method of adjustment is well-calibrated to ensure that public funding is attractive to candidates without making it irrational for some candidates to opt out, should they so choose.

The voters evidently concluded that such a regime best balanced the State's interest in reigning in campaign fundraising (and its attendant harms) with the interest in establishing a public funding regime that would continue to attract candidates even in races in which spending would be over the amount of the statutory thresholds. If Arizona can implement a public financing law, it can also implement reasonable measures to encourage candidates to participate in public financing, and to make public financing a reasonable choice even when candidates expect a campaign may generate a more-than-normal amount of political spending. These are legitimate state interests that are wholly unrelated to the suppression of speech.

5. The Challenged Trigger Provision Bears a Substantial Relation to The Law's Anti-Corruption Interests

The "trigger" of A.R.S. §16-952 bears a "substantial relation" to the accomplishment of Arizona's interest in reducing corruption and its appearance. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64). The trigger tailors the level of funding to the financial competitiveness of the race.

Arizona could have chosen to fund each campaign at the level of the cap, eliminating the feature of the law to which Petitioners object. But such a uniformly high funding rate would have resulted in a substantial drain on the state's budget, and would have led to a level of spending the state could reasonably determine was not generally necessary to inform the public and accomplish the law's other important purposes. So instead it determined to set funding at a level that it judged will be adequate in the normal case, and then to provide funding at the higher level (up to the statutory cap) when other spending in the campaign makes the lower amount insufficient to fund a competitive campaign.

The trigger thus furthers the same general anti-corruption purpose as the law of which it is a part. It makes the public financing system effective and efficient, supporting the law's anti-corruption purposes. Indeed, A.R.S. §16-952(C)(3) requires that independent expenditures *in favor* of participating candidates also be counted when determining how much funding other participating candidates will receive. The law in this way ensures that participating candidates have an appropriate funding level even when facing other participating candidates.

This system of tailoring the public subsidy to the financial competitiveness of the relevant races does not under-

mine its constitutionality; if anything, it strengthens it. If Arizona had instead simply funded all races at the maximum level, its system would have been closely parallel to the federal Presidential funding law the Court upheld in *Buckley*, but participating candidates in some less competitive races would have received substantially more funding than their non participating opponents, wasting state resources and placing those non-participating candidates at a greater competitive disadvantage.

Calibrating the level of funding to reflect the other financial expenditures in the race also protects candidates' ability to opt out of the public financing system. It does so by limiting the risk that nonparticipants will be substantially outspent by a participating opponent. If Arizona had simply decided to disburse the maximum amount of funds to all participants rather than reserving most of the funds for competitive races, there would be many more cases in which participating candidates substantially outspent nonparticipating candidates.

Candidates are often uncertain regarding their private fundraising abilities. Had they been faced with the prospect of such generously funded participating opponents, many likely would have felt the safer course would be to participate and receive the same subsidy. By instead adopting a more carefully calibrated method for calculating subsidy levels, Arizona voters ensured that viable nonparticipating candidates can safely opt out of the system without fearing they might be massively outspent by participating opponents. Because participants are guaranteed only a modest subsidy initially and receive more only if their opponents have raised substantial additional sums, viable nonparticipating candidates can feel safe in the knowledge that they will rarely be outspent.

Petitioners nevertheless argue that they suffer disadvantages if they opt out of the system because their oppo-

nents will have access to public funding at the statutory threshold level and, if they and their independent supporters spend above that amount, their opponents will receive increased public funding up to the maximum set by statute. They complain that knowledge of these aspects of the law will affect their spending decisions, and in particular will influence candidates to spend less than they otherwise might. The public finance law might even persuade a candidate to forgo private financing and to opt into the public financing system. This regulation, Petitioners complain, thus places them "on the horns of a dilemma" as they adjust their speech conduct to the regulatory regime. Pets. Br. 42.

A similar dilemma faces all candidates who are considering whether to accept the benefits and burdens of participating in any public financing system, including the federal Presidential public financing system upheld in *Buckley*. The existence of the public funding option, and the fact that opponents may choose to accept public funds, will influence the choices candidates make. The availability of public funds up to a certain limit discourages candidates from choosing to spend above that limit by forcing them to reject public funds in order to do so.

But *most* regulations put regulated parties "on the horns of a dilemma". They must choose whether to suffer whatever burden the regulation creates or to forgo the behavior that is being regulated. A person wishing to make a political independent expenditure, for example, must evaluate the benefits of making that expenditure against the burdens of complying with substantial disclosure and disclaimer rules. A person wishing to make a political contribution must weigh the benefit he hopes to gain against the cost of having his name made public, and the need to maintain records so that he does not inadvertently violate contribution limits if he makes additional

contributions. If the mere fact that regulation of First Amendment conduct puts choices to the regulated party gave rise to strict scrutiny, every campaign finance regulation would be constitutionally suspect. That is not the law and that should not be the law.

The choice to reject public financing in Arizona evidently is a viable one. Many candidates – including some Petitioners – have chosen to opt out of the public system and continue to raise and spend unlimited public funds and to win elections after doing so. Candidates who opt out have to work to raise more funds privately, but they obtain several other advantages. Many candidates expect or hope that they will raise more the maximum funding their participating opponents can receive under A.R.S. § 16-952 and that being able to outspend their participating opponents will help them win. It is not only candidates who expect to raise such large amounts who might decide to opt out, however. Other candidates might predict that a higher level of campaign spending, even if done equally by both campaigns, will redound to their benefit because they believe the strength of their arguments is superior or that their staff will design more effective ads. In addition, even when candidates do not initially predict that a higher level of spending will aid their campaigns, they may opt out because of the value of retaining the ability to initiate a change in the level of the spending in the race if, and only if, they think it will help them capture or retain the lead. Because only nonparticipants may choose whether to exceed the initial spending caps, many might rationally opt out of the system in order to obtain this strategic advantage over nonparticipating opponents. These are not choices that on their face abridge the constitutional rights of non participating candidates.

For all of these reasons, the Arizona "trigger" provi-

sions advance the statute's important anti-corruption purposes and pass constitutional muster.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

JUDITH A. SCOTT
MARK D. SCHNEIDER*
ARI WEISBARD
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036
(202) 350-6571
MARK.SCHNEIDER@SEIU.ORG

Counsel for Amicus Service Employees International Union

February 22, 2011

---

* *Counsel of Record*